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IN THE

Supreme Court of the United States

October Term 1937

No. ———

Harvey S. Adams, Receiver, Penn National Bank and Trust Company of Reading, Pennsylvania,
Petitioner,

vs.

Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Mayer,
Respondents.

No. ———

Harvey S. Adams, Receiver, Reading National Bank and Trust Company of Reading, Pennsylvania,
Petitioner,

vs.

J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Your petitioner, Harvey S. Adams, as Receiver of the Penn National Bank and Trust Company of Reading, Pennsylvania, successor to William H. McGowan, former Receiver of said bank, appellee below, and also as Receiver

of the Reading National Bank and Trust Company of Reading, Pennsylvania, respectfully prays that writs of certiorari issue to the United States Circuit Court of Appeals for the Third Circuit to review judgments of that Court entered on March 10, 1937 (R. 96, 97) reversing the decrees of the United States District Court for the Eastern District of Pennsylvania, which dismissed the original bills of complaint in these cases.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Third Circuit was rendered March 10, 1937 (R. 88) and is reported in 88 Fed. (2d) 936. The opinion of the United States District Court for the Eastern District of Pennsylvania, dismissing the original bills of complaint in these cases, was rendered May 1, 1935 (R. 27) and is not reported. The subsequent opinion of the United States District Court dismissing the amended bills of complaint was rendered June 25, 1935 (R. 33) and is not reported.

In view of the similarity of the questions presented in these two cases an order was entered below consolidating them for the purpose of an appeal, and for these reasons both cases have been made the subject of one petition in this Court.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, U. S. C. Title 28, Section 347 (a).

HISTORY OF THE CASE

These suits were commenced in equity in the United States District Court for the Eastern District of Pennsylvania by certain stockholders of the Penn National

Bank and Trust Company and the Reading National Bank and Trust Company, both of Reading, Pennsylvania (hereinafter referred to as the Penn National and Reading National). In each case the Comptroller of the Currency of the United States and the Receiver of the bank were defendants. The purpose of the suits was to enjoin the collection of 100% assessments levied by the Comptroller of the Currency against the stockholders of these two banks and to have said assessments declared illegal and invalid. In each of these cases the Receivers moved to dismiss the bills of complaint (R. 22, 67).

The United States District Court for the Eastern District of Pennsylvania sustained the motions to dismiss and dismissed the original bills of complaint as to the Receivers (R. 27), and subsequently the bills of complaint, as amended, were dismissed (R. 35, 75).

STATEMENT OF FACTS

Respondents herein, appellants below, are stockholders of the Penn National and Reading National banks, which had a capital respectively of $1,000,000.00 and $600,000.00 represented by 100,000 shares and 60,000 shares, of a par value of $10.00 per share (R. 4, 49).

For many years prior to 1933, these banks had conducted a banking business in the city of Reading, Pennsylvania. Prior to March 18, 1933, these banks were "on the verge of insolvency" (R. 6, 51). Thereupon the Comptroller of the Currency placed them in conservatorship, and thereafter, finding them to be insolvent, and unable to pay their debts (Par. 23) (R. 12, 56) the Comptroller placed them in receivership.

After a valuation of their assets and after an accounting from the receiver of each bank (R. 20, 64), the Comptroller officially found that a 100% assessment on shareholders was necessary to pay their debts, and on January 15, 1935 demand was made for payment of the assessment (R. 20, 64).

Notwithstanding the official findings of the Comptroller as to insolvency and the inability of these banks to pay their debts, and his official determination that a 100% assessment on shareholders was necessary, certain stockholders in each bank brought representative suits against the Receiver and the Comptroller, seeking to enjoin the collection of the assessment and to avoid payment of their statutory liability.

The following facts are set forth in the bills of complaint in each case as reasons for avoiding payment of the assessment:

That on February 17, 1933, "in contemplation of a consolidation" the Penn National and Reading National entered into an agreement with the Farmers National Bank and Trust Company of Reading (hereinafter referred to as the Farmers National), which agreement provided for an assumption by the Farmers National of the deposit and other existing liabilities of the Penn National and Reading National, excepting liabilities to shareholders, (R. 5, 50), and for the transfer of the assets of the Penn National and Reading National to the Farmers National. The bills further averred that these three banks entered into a supplemental agreement on February 20, 1933, "at the direction of the Comptroller of the Currency" whereby the Penn National and Reading National guaranteed that their respective assets would exceed in value the deposit and other liabilities assumed by the Farmers National (R. 6, 50); that thereafter there followed a transfer of all the assets of the Penn National and Reading National to the Farmers National and a surrender of control, and subsequently the business of all the banks was conducted by the Farmers National "with the knowledge, approval and acquiescence of the Comptroller of the Currency, his agents and representatives" (R. 6, 51).

It was further averred that prior to the execution of said agreement of February 17, 1933, the Penn National and Reading National were subjected to unusual with-

drawals which placed them "on the verge of insolvency" for which reason the contract of February 17, 1933, and the supplemental contract, were executed (R. 6, 51); that after February 17, 1933 the Penn National and Reading National ceased to control their assets and to transact their banking business; that the assets of the Penn National transferred to the Farmers National exceeded $6,500,000.00 in value and had a fair market value of $5,400,000.00 (R. 7), and that on the same date the assets of the Reading National had a value in excess of liabilities assumed by the Farmers National, which liabilities assumed amounted to $9,000,000.00 (R. 52).

The bills of complaint then stated that the assets of the Penn National and the Reading National were commingled with the assets of the Farmers National (R. 8, 53); that on March 18, 1933 the Acting Comptroller of the Currency appointed a Conservator for the Farmers National who administered the assets of the three banks until October 10, 1933 when the Comptroller directed that the transfer of assets from the Penn National and Reading National to the Farmers National be disregarded, and ruled in effect that the agreements of February 17, 1933 and February 20, 1933 were without legal effect (R. 9, 54); that on October 10, 1933 the Comptroller appointed a Conservator for the Penn National and Reading National (R. 10, 54) and later proposed a plan of reorganization, which involved a sale of certain assets to a national bank newly to be organized and a division of the proceeds of such sale among the creditors of the Farmers National and the Penn National and Reading National (R. 10, 55); and subsequently dividends were paid from such proceeds to creditors of the three banks.

The bills of complaint then stated that the Conservator disregarded the claims of the Penn National against the Farmers National in approximate amount of $5,100,000.00, and the claim of the Reading National against the Farmers

National in the approximate amount of $9,000,000.00, and that the Comptroller, Conservator and Receiver neglected and refused to collect these claims of the Penn National and Reading National against the Farmers National, which claims were the only resources available to the banks to pay their creditors; and that in arriving at the valuation of the assets and determining insolvency these claims against the Farmers National were disregarded (R. 13, 57).

It was further averred that on January 15, 1935 the Comptroller of the Currency made an assessment on the shareholders of the Penn National and Reading National *"upon a proper accounting by the Receiver"* and *"upon a valuation of the uncollected assets remaining in his hands,"* (R. 12, 56) having found after such accounting and valuation that the assessment was necessary in order to pay the debts due from the Penn National and Reading National to their creditors (R. 20, 64); but that said assessment was illegal and invalid (R. 13, 58) because the Comptroller acted upon an "unwarranted assumption of judicial power" (R. 13, 57) in waiving and cancelling said claims against the Farmers National.

Summed up, the only contention advanced by the averments of the bills of complaint is that although the Comptroller officially found that the banks were insolvent, and although after an accounting from the Receivers and a valuation of the assets in their hands, the Comptroller found that the assets of the Penn National and Reading National were insufficient to pay the claims of their creditors, and officially determined that 100% assessments on shareholders were necessary in order to pay such claims, nevertheless the stockholders say that in arriving at this conclusion, which was within his official discretion to make, the Comptroller failed to give proper value to certain alleged claims of the Penn National and Reading National against the Farmers National which claims, had they been properly evaluated, would have made the assessments unnecessary.

SPECIFICATIONS OF ERRORS

The United States Court of Appeals for the Third Circuit erred:

1. In reviewing the act of the Comptroller of the Currency performed in the exercise of official judgment and discretion determining that 100% assessments were necessary upon the stockholders of the Penn National and Reading National banks in order to pay the debts of those insolvent associations.

2. In reviewing the official determination by the Comptroller of the Currency that the Penn National and Reading National were insolvent and unable to pay their debts.

3. In holding that notwithstanding the determination by the Comptroller, arrived at in the exercise of official judgment and discretion after an accounting from the Receiver of each of these banks and a valuation of the assets, nevertheless the ensuing assessments were invalid.

4. In holding that the Comptroller of the Currency did not have the right to disregard the agreement of February 17, 1933, to re-transfer their assets to the Penn National and Reading National, and to levy assessments upon shareholders of these associations, when he officially found that such action was necessary to pay their debts.

5. In holding in effect that the executory contract of February 17, 1933, and the transfer of assets of the Penn National and Reading National to the Farmers National, and the resulting intermingling of the assets, created a merger or consolidation of the banks which the Comptroller could not set aside.

6. In permitting the stockholders to set up their judgment as to the value of the assets of the Penn National and Reading National, and their opinion as to the necessity for the assessments upon shareholders of these insolvent associations, against the official determination of the Comptroller to the contrary.

QUESTIONS PRESENTED

1. Can the stockholders attack the official finding and determination of the Comptroller as to insolvency of the Penn National and Reading National banks, and the necessity for assessments on their shareholders, arrived at in the course of his official judgment and discretion after an accounting from the Receivers and a valuation of the banks' assets?

2. Did the Comptroller of the Currency have a right to disregard the attempted merger of the Penn National and Reading National with the Farmers National growing out of the agreement of February 17, 1933?

3. Did the transfer of assets of the Penn National and Reading National to the Farmers National, and their subsequent intermingling, resulting from the contract of February 17, 1933, create a legal merger or consolidation of the banks which the Comptroller of the Currency was bound to recognize?

4. Did the attempted merger of the Penn National and Reading National with the Farmers National, as a result of the contract of February 17, 1933, create any claims in favor of the first mentioned banks which the Comptroller was bound to consider before levying the assessments on stockholders of these two insolvent associations?

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Upon the questions presented and the authorities hereinafter cited, it is respectfully submitted that a writ of certiorari should be granted for the following reasons:

1. The United States Circuit Court of Appeals for the Third Circuit has decided an important question of Federal law in a manner in conflict with applicable decisions of this Court, and in conflict with decisions of United States Circuit Courts of Appeal other than the Third Cir-

cuit, and in conflict with its own decisions, upon the question of the right of shareholders in national banking associations to inquire into the correctness of the official determinations and findings of the Comptroller of the Currency as to insolvency and the necessity for an assessment. Although these equity proceedings are in the guise of a direct attack, as distinguished from a collateral attack upon the Comptroller's official findings in these matters, nevertheless they constitute an inquiry into the correctness of those findings which is not permitted by law.

The bills of complaint show (Par. 24—R. 12, 56) that the Comptroller of the Currency officially determined, after an accounting from the Receiver and after a valuation of the remaining assets in the Receiver's hands, that he was satisfied that it was necessary to enforce the individual liability of the stockholders in order to pay the debts of these insolvent banks (R. 20, 64). To allow the stockholders to challenge these official determinations and findings would be to permit an attack and inquiry not permitted by law.

The rule governing the right of the Comptroller to determine the question of insolvency and the necessity for an assessment on shareholders in national banking associations is laid down by this Court in the following cases, among others:

Kennedy v. *Gibson*, 8 Wall. 498
Casey v. *Galli*, 94 U. S. 673
National Bank v. *Case*, 99 U. S. 628
Bushnell v. *Leland*, 164 U. S. 684
Forrest v. *Jack*, 294 U. S. 158—733.

The same rule is laid down by other Circuits in recent decisions, illustrative of which are the following:

Collins v. *Caldwell*, 29 Fed. (2) 329, CCA 5
Chase v. *Hall*, 30 Fed. (2) 195, CCA 9
Crawford v. *Gamble*, 57 Fed. (2) 15, CCA 6
Wannamaker v. *Edisto Bank*, 62 Fed. (2) 696, CCA 4
Schram v. *Schwartz*, 68 Fed. (2) 699, CCA 2

Emery & Co. v. *Wilkinson*, 72 Fed. (2) 10, CCA 10
O'Connor v. *Watson*, 81 Fed. (2) 833, 836, CCA 5
Meeker v. *Baxter*, 83 Fed. (2) 183, CCA 2
Silk v. *Ake*, 83 Fed. (2) 618, CCA 6.

The same rule is laid down by the Circuit Court of Appeals for the Third Circuit in the case of *Miller* v. *Stock*, 65 Fed. (2) 773. *It should be noted that there is a strong dissenting opinion in the instant case wherein this case is cited.*

The effect of the decision in this case is to permit an inquiry by the stockholders as to the correctness of the Comptroller's decision and official determination of insolvency and the necessity for an assessment, and to require an accounting as to the value of the assets in order to determine the necessity for the assessment, notwithstanding the fact that the record shows (R. 12, 56) that the Comptroller has already officially determined that the assets are of insufficient value to pay the debts of these banks.

2. The decision of the United States Circuit Court of Appeals for the Third Circuit reversing the United States District Court appears to be erroneous for the following reasons:

(a) *It ignores the fact that the Comptroller of the Currency had the right to set aside the attempted merger because no legal consolidation resulted from the contract of January* 18, 1930.

The National Bank Act (Section 33, Title 12, U. S. C. A.) sets forth the method whereby two or more national banking associations may consolidate. Among the mandatory requirements for a completed and valid consolidation are:

1. Agreement upon the terms of consolidation by a majority of the Board of Directors.
2. Confirmation by the affirmative vote of two-thirds of the shareholders.
3. Publication.
4. Approval of the consolidation by the Comptroller or the Currency.

The Courts have held that compliance with these statutory requirements must be had before a legal consolidation can result.

Ex parte Worchester County National Bank, 279 U. S. 347
McCormick v. *Market National Bank*, 165 U. S. 538
Benedict v. *Anderson*, (3 C. C. A.) 70 Fed. (2) 227
Hiatt v. *Peddy* (5 C. C. A.) 73 Fed. (2) 235.

In its opinion in the instant case the Court below said:

> "The crux of this case centers in the right of the Comptroller to abrogate and set aside the contract in accordance with which the Penn and Reading banks conveyed their assets to the Farmers Bank, in consideration for which the Farmers Bank agreed to pay the obligations of the other two banks."

The record does not disclose that these mandatory requirements were met or in any way complied with by the banks signatory to the contract of February 17, 1933. It follows that since no legal consolidation was accomplished the Comptroller had the right to restore the banks to their original status by declaring that the attempted merger or consolidation had failed of completion. Having this right, the Comptroller of the Currency acted properly in disregarding the merger, returning the assets of the respective banks to the conservators, appointing receivers for the banks and in levying the stock assessments. A mere intermingling of assets of two or more national banks does not create a consolidation which the Comptroller cannot ignore and set aside, nor does it work an estoppel upon the right of the Comptroller of the Currency to levy an assessment when he finds such action necessary.

Hightower v. *American National Bank*, 263 U. S. 351;
Fuller v. *City National Bank of Huron*, 52 Fed. (2) 865-870; 8 CCA;
Stevens v. *Hamilton*, 81 Fed. (2) 324, 7 CCA.

(b) *Assuming that a merger as distinguished from a legal consolidation had resulted, still the Comptroller could levy assessments on the stockholders of the Penn National and Reading National if he found it necessary, and could collect such assessments through his receivers.*

The cases hold that where one bank merges with another, such merger does not amount to a legal consolidation; and if the merged bank goes into voluntary liquidation nevertheless the right of the Comptroller of the Currency to levy an assessment on the stockholders of the merged bank remains unaffected.

Washington National Bank v. *Eckles*, 57 Fed. 870;
Liberty Bank v. *McIntosh*, 16 Fed. (2) 906;
Stevens v. *Hamilton*, 81 Fed. (2) 324, 7 CCA;
O'Connor v. *Watson*, 81 Fed. (2) 833, CCA 5—Cer. Den. 298 U. S. 657.

(c) *The decision of the Court below assumes that the agreement of February* 17, 1933, *contemplating a merger, originated with and was consented to by the Comptroller.*

The bill of complaint (Par. 6) (R. 5, 49) and the contract itself (R. 15, 60) show that the banks originated the plan to "merge", which resulted in the contract of February 17, 1933. The Comptroller of the Currency was not a party signatory or otherwise to the contract of February 17, 1933 (R. 15, 16). There is nothing in the averments of the bills of complaint in either case, or in the contract itself, that would indicate that the plan to "merge" the Penn National and the Reading National with the Farmers National originated with the Comptroller or was consented to by him. The contract was at most executory and, to validate it, the approval and consent of the Comptroller was necessary; and there is no averment contained in the bills of complaint that such approval or consent was obtained.

But in any event the Comptroller of the Currency did not "abrogate or set aside" any contract rights of the

contracting parties as assumed by the Court below, nor did he disturb any legal rights accruing thereunder. The Comptroller merely acted on the situation as he found it, (no executed contract) and determined the rights of the respective banks in so far as the contract had been executed and returned the assets to their representatives.

3. The decision and judgment as it stands calls for an immensely complicated inquiry into the value of assets and this many years after the contract and attempted merger occurred.

The practical effect of such a proceeding would delay indefinitely the liquidation and winding up of the affairs of these banks and the distribution to creditors. It is respectfully submitted that such was not the intention of Congress nor the correct meaning of the decisions construing the national banking laws applicable to such a situation. This Court has held that the intention of the law was to promote a speedy liquidation for the benefit of creditors.

> "A speedy adjustment is necessary to the efficiency and utility of the law; the interest of the creditors require it and it was the obvious policy and purpose of Congress to give it."
>
> *Kennedy* v. *Gibson,* 8 Wall. 498, 505, 506.

And in this connection the court below said in *Miller* v. *Stock:*

> "We are admonished by the Supreme Court that it is the duty of Federal Courts to act promptly in aiding the Comptroller in enforcing the liability of shareholders—in pursuance thereof we act with promptness in disposing of this case and no longer delaying the enforcement of the Comptroller's assessment made September 28, 1931."

To permit an inquiry of the kind, which must necessarily result as the opinion of the Court below stands, would be to set a precedent not sanctioned by this Court or even by the former decision of the Court below.

4. The United States Circuit Court of Appeals for the Third Circuit has decided a question of general importance adversely to thousands of creditors and depositors of these insolvent banks in process of liquidation under direction of the Comptroller and contrary to well established rules and principles laid down by the Federal cou.ts.

The reasons advanced for invalidating the Comptroller of the Currency's assessment are at most technical and should not be permitted to react unfavorably against such a large group of creditors.

This Court has held that this double liability for assessment is for the protection of creditors (See *Christopher* v. *Norvell*, 201 U. S. 216, 225), and that a technical construction should not be resorted to for the purpose of defeating their interests (*Korbly* v. *Springfield Institution for Savings*, 245 U. S. 330, 333).

5. The decision of the Court below establishes a precedent heretofore unsanctioned by this Court, and involves a vital and important question arising under the national banking laws which is of fundamental importance in the liquidation of a large number of national bank receiverships throughout the country. It is believed that the decision below has far reaching effect with reference to the right of inquiry by stockholders into the official determinations and findings of the Comptroller of the Currency, and their right to question his valuations of assets and his determinations as to insolvency and the necessity for levying an assessment on stockholders. It is believed that the Court should assume jurisdiction in this case in order that such a decision, contrary to all precedent, should not be permitted to delay the liquidation of banks and the early distribution of the proceeds of liquidation to creditors.

WHEREFORE, it is respectfully submitted that this petition should be granted.

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